(10)

Supreme Court, U.S.
FILED

FEB 2 - 2006

OFFICE OF THE CLERK

No. 05-5705

In the Supreme Court of the United States

HERSCHEL HAMMON, PETITIONER

v.

STATE OF INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an assault victim's statement that she was assaulted, made in response to emergency questioning by a police officer on the scene of the assault, was testimonial within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 5
Argument:
The victim's statement in this case was not testimonial because it was the product of emergency questioning 6
A. Statements that are the product of emergency questioning are not "testimonial" under the Confrontation Clause 7
B. The oral statements made by Ms. Hammon were a response to emergency questioning 12
Conclusion 16

TABLE OF AUTHORITIES

Case:
Bourjaily v. *United States*, 483 U.S. 171 (1987) 8
Crawford v. *Washington*, 541 U.S. 36 (2004) 1, 3, 5, 6, 9, 10, 11, 14
Mincy v. *Arizona*, 437 U.S. 385 (1978) 12
United States v. *Brooks*, 367 F.3d 1128 (9th Cir. 2004), cert. denied, 543 U.S. 1058 (2005) 12
United States v. *Hadley*, 431 F.3d 484 (6th Cir. 2005) .. 11
United States v. *Russell*, No. 04-10681, 2006 WL 213853 (9th Cir. Jan. 30, 2006) 11

Constitution and rules: Page

U.S. Const.:

Amend. IV 11

Amend. VI (Confrontation Clause) 4, 5, 6, 7, 8, 9, 13

Fed. R. Evid.:

Rule 801(c) 8

Rule 803 advisory committee's note (1972) 8

Rule 806 advisory committee's note (1972) 8

Ind. Code Ann., R. Evid. 803(c) (Michie 2005) 3

Miscellaneous:

Noah Webster, *An American Dictionary of the English Language* (1828) 14

In the Supreme Court of the United States

No. 05-5705

HERSCHEL HAMMON, PETITIONER

v.

STATE OF INDIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case, like *Davis* v. *Washington*, No. 05-5224, presents the question whether the rule against the admission of "testimonial" statements established in *Crawford* v. *Washington*, 541 U.S. 36 (2004), applies to statements made in response to emergency questioning. Because that question has substantial implications for the conduct of federal criminal trials, the United States has a significant interest in the Court's disposition of this case.

STATEMENT

1. On February 26, 2003, in response to a report of a domestic disturbance, Officer Jason Mooney of the Peru, Indiana, Police Department went to the home of petitioner and his wife, Amy Hammon. J.A. 81. Mooney

was accompanied by Officer Rod Richard. J.A. 81. When Mooney arrived at petitioner's house, Ms. Hammon was on the front porch and appeared frightened. J.A. 13. When Mooney asked whether there was any problem, however, Ms. Hammon responded that "nothing was the matter" and that she was "okay." J.A. 14. Officer Mooney asked for permission to enter the house to make sure that everything was "okay," and Ms. Hammon gave her consent. J.A. 14.

On entering the living room of the house, Mooney observed a heating unit emitting flames and fragments of glass from the unit on the floor nearby. J.A. 16. Mooney then encountered petitioner and asked him what had happened. J.A. 16. Petitioner told Mooney that he and his wife had been in an argument, but that the argument had never become physical, and everything was fine now. J.A. 17. Mooney left Officer Richard with petitioner in the kitchen and returned to the living room to speak with Ms. Hammon. J.A. 17, 32.

At that point, Ms. Hammon told Mooney that she and her husband had argued about their daughter going to her boyfriend's house, that during the argument, petitioner began breaking things in the living room, including the lamp, the phone, and the heater, and that eventually petitioner pushed her down, shoved her head into the broken glass of the heater, and punched her twice in the chest. J.A. 17-18. During the course of Mooney's exchange with Ms. Hammon, petitioner tried to walk into the room, and when he did, Ms. Hammon became quiet, apparently afraid to speak. J.A. 32.

Near the end of his investigation, Mooney asked Ms. Hammon to fill out an affidavit describing what had happened, and Ms. Hammon complied. J.A. 18-20. The affidavit stated that petitioner "[b]roke our furnace &

shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." J.A. 2. The affidavit expressed Ms. Hammon's understanding that Officer Mooney was relying on the allegations in the affidavit to establish probable cause to arrest petitioner, and the affidavit was signed by Ms. Hammon and witnessed by Officer Mooney. J.A. 2-3.

2. Petitioner was charged with committing domestic battery and violating the terms of his parole. J.A. 82. The prosecutor subpoenaed Ms. Hammon, but she did not appear for trial. Over petitioner's objection, the trial court admitted as an excited utterance Ms. Hammon's statement to Mooney that petitioner had assaulted her. J.A. 83. Indiana's excited utterance exception to the hearsay rule allows the admission of a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ind. Code Ann., R. Evid. 803(c) (Michie 2005). The district court also admitted Ms. Hammon's affidavit as a present sense impression. J.A. 83. After a bench trial, petitioner was convicted of domestic battery and found to have violated his parole. J.A. 83.

3. The Indiana Court of Appeals affirmed. J.A. 66-79. The court first held that the district court did not abuse its discretion in admitting, as an excited utterance, Ms. Hammon's oral description of the assault to Officer Mooney. J.A. 68-72.

While the appeal was pending, this Court held in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that the Confrontation Clause generally precludes the admission of "testimonial" hearsay unless the declarant is unavail-

able and the defendant has had a prior opportunity to cross-examine. Applying *Crawford*, the court of appeals held that Ms. Hammon's oral description of the assault was not testimonial, and its admission therefore did not violate the Confrontation Clause. J.A. 75. The court reasoned that a statement is testimonial when it has an "official and formal quality," and that Ms. Hammon's oral statement to Mooney did not have that quality. J.A. 75-76. The court further held that Ms. Hammon's oral statement to Mooney did not result from interrogation because the term interrogation does not include "preliminary investigatory questions asked at the scene of a crime shortly after it has occurred." J.A. 77. The court held that any error in admitting Ms. Hammon's affidavit was harmless. J.A. 68 n.1.

4. The Indiana Supreme Court affirmed. J.A. 80-107. The court held that Ms. Hammon's oral statement to Mooney was admissible under Indiana law as an excited utterance, because Ms. Hammon appeared frightened when Mooney arrived, and because it was reasonable to infer that Mooney arrived promptly after receiving a report of a domestic disturbance. J.A. 85-87.

The court also held that the admission of the oral statement did not violate the Confrontation Clause. J.A. 87-104. The court held that a statement is "testimonial" for purposes of the Confrontation Clause when it is "given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." J.A. 100. Applying that test, the court concluded that Ms. Hammon's oral statement to Mooney was not testimonial, because Mooney "was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene," and "Ms. Hammon's motivation was to convey basic facts," not to have "her initial re-

sponses preserved or otherwise used against [petitioner] at trial." J.A. 104. The court held that Ms. Hammon's affidavit was testimonial, because "at least one principal reason to preserve Ms. Hammon's story was to provide a basis for its use as evidence or impeachment in [petitioner's] potential criminal prosecution." J.A. 104. The court concluded, however, that the admission of the affidavit was harmless beyond a reasonable doubt. J.A. 106.

SUMMARY OF ARGUMENT

In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court made clear that the Confrontation Clause's core textual and historical concern is eliminating the civil law method of proof, which permitted the use of *ex parte* examinations as evidence against the accused. The Court's approach to determining whether an out-of-court statement infringes that core concern—and thus is "testimonial"—requires assessing whether a modern-day hearsay statement presents the type of acute dangers raised by the historical abuses that the Framers targeted.

As the government's amicus brief in *Davis* v. *Washington*, No. 05-5224, explains in detail, statements made to officials faced with an apparent emergency, and who ask questions reasonably necessary to resolve that emergency, are not "testimonial" statements. Those statements do not share the three central features that characterized the civil law method of *ex parte* examinations: emergency questioning does not clearly convey to the declarant that she is giving statements for use in a legal proceeding; the government is highly unlikely to exploit an emergency to shape statements for use in a future trial; and the statements taken in an emergency

have independent probative force that makes them far more than only a weaker substitute for live testimony.

Because statements given in an emergency have none of the critical features of the classic testimonial statements identified in *Crawford*, and because there is no historical basis for expanding the reach of *Crawford* to encompass such statements, they are not testimonial.

In this case, the oral statements given by Ms. Hammon were made in on-the-scene questioning by officers who were, objectively, faced with a possible emergency and the need to ensure the safety of a possible victim. The statements were the product of an inquiry reasonably necessary to assess the existence of an imminent threat of harm. Accordingly, the statements were not testimonial and their admission did not violate the Confrontation Clause.

ARGUMENT

THE VICTIM'S STATEMENT IN THIS CASE WAS NOT TESTIMONIAL BECAUSE IT WAS THE PRODUCT OF EMERGENCY QUESTIONING

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. *Crawford* v. *Washington*, 541 U.S. 36 (2004), announced the rule under the Confrontation Clause that testimonial statements of an unavailable declarant generally may not be admitted to prove the truth of the matter asserted absent a prior opportunity for cross-examination. Looking to the historical abuses that inspired the Confrontation Clause, the Court identified, as modern–day counterparts, testimony at a preliminary hearing, a grand jury, or a former trial, and the products of police interrogation. The present case involves a class of state-

ments not considered in *Crawford*—statements responding to emergency questioning. Those statements critically differ from the historical abuses at which the Confrontation Clause was centrally aimed, and they are not testimonial.

A. Statements That Are The Product Of Emergency Questioning Are Not "Testimonial" Under The Confrontation Clause

1. For the reasons set forth in the United States' Brief as Amicus Curiae in *Davis* v. *Washington*, No. 05-5224, out-of-court statements that are the product of emergency questioning are not testimonial within the meaning of this Court's decision in *Crawford*, and their admission therefore does not violate the Confrontation Clause. As explained in that brief, emergency questioning is questioning that is reasonably necessary to determine whether there is a present or imminent risk of harm to an individual or the public, and if so, how to resolve that emergency. *Id.* at 10. Such questioning is not testimonial within the meaning of the Confrontation Clause because it does not have any of the characteristics of the *ex parte* examinations that the Framers sought to abolish as evidence against the accused. In particular, emergency questioning does not communicate to a declarant that his or her statement is being sought for use in a legal proceeding; it does not create a unique danger that the government will shape a statement to support its case; and it often produces statements that have probative force that is independent of a witness's live testimony. *Id.* at 11-19.

Like petitioner in *Davis*, petitioner in this case argues (Br. 13) that any out-of-court statement to a government agent that implicates a person in criminal activ-

ity is testimonial, including statements made in response to emergency questioning. And like petitioner in *Davis*, petitioner alternatively argues (Br. 18), that a statement is testimonial when a reasonable person would anticipate that his statement would be used in investigation or prosecution of crime. For the reasons set forth in the United States' Brief in *Davis* (at 14-16, 19-28), neither approach is consistent with *Crawford*, and neither approach has support in the history of the development of the Confrontation Clause.

2. Petitioner's articulation and defense of his legal standard is particularly flawed for several additional reasons.

First, petitioner relies heavily on a legal test that focuses the "testimonial" determination on "whether the statement fulfills the *function* of testimony." Br. 7. Yet petitioner explicitly declines to make any "detailed or precise exegisis of what that function is." Br. 12. For good reason: the function of testimony is to prove facts that are relevant in the determination of a case. That function extends broadly to *all* hearsay statements, which are, by definition, introduced to prove the truth of the matter asserted. See Fed. R. Evid. 801(c).[1] Petitioner's "functional" test thus logically would encompass the statements of all hearsay declarants, whose words perform the "function" of live, in-court testimony. This

---

[1] For that reason, the drafters of the Federal Rules of Evidence took the position that "[i]n a hearsay situation, the declarant is, of course, a witness." Fed. R. Evid. 803 advisory committee's note (1972 proposed rules); see also Fed. R. Evid. 806 advisory committee's note (1972 proposed rules) ("The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.").

Court in *Crawford*, however, explicitly rejected the idea that all hearsay statements are "testimonial" within the meaning of the Confrontation Clause. See 541 U.S. at 56 (giving examples of non-testimonial hearsay such as business records and statements in furtherance of a conspiracy).

Second, petitioner's further effort to refine (Br. 12-13) his functional test—stating that it includes any statement that "transmits information for use in investigation or prosecution of crime"—also is fatally overbroad. A statement by a co-conspirator to an unknown government agent surely "transmits information for use in investigation or prosecution of crime"; indeed, that is the very purpose for which the undercover informant gathers the information. Yet the Court not only upheld the admission of such statements in *Bourjaily* v. *United States*, 483 U.S. 171 (1987), but reaffirmed that such statements are not "testimonial" in *Crawford*, 541 U.S. at 57-58, and petitioner himself concedes (Br. 14-15) that this rule is correct. The fact that petitioner's functional test captures examples that are universally recognized as *not* testimonial illustrates its flaws. An abstract definition of "testimonial" cannot substitute for *Crawford*'s own approach of examining whether modern practices present closely analogous dangers to the known abuses that prompted the Confrontation Clause.

Third, petitioner asserts (Br. 7) that, "[i]n assessing whether a statement is testimonial, the critical perspective is not that of the questioner, * * * but that of the speaker." Petitioner's exclusive focus (Br. 7) on a declarant's reasonable anticipation that the statement would be used "in investigation or prosecution of crime," however, ignores this Court's emphasis in *Crawford* on a crucial concern underlying the Confrontation Clause:

that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." 541 U.S. at 56 n.7. *Crawford* treated that testimony-generating purpose by government agents as the defining feature of the historical experiences that produced the confrontation right. *Ibid.* Petitioner's attempt to veer away from that focus obscures a central reason why emergency questioning is not testimonial, *i.e.*, that officers facing an apparent emergency do not characteristically act "with an eye toward trial." Rather, reasonable officers perform, first and foremost, a safety and protection function that requires an immediate focus on the danger at hand. That conduct is readily distinguishable from the abuses in *ex parte* generation of evidence in order to prepare a prosecution.[2]

Petitioner incorrectly suggests that the facts in this case prove that emergency questioning is a species of evidence gathering. In his view (Br. 8) , the officer in this case "procured the oral accusation at least in substantial part as a step in the process of gathering proof for prosecution"; the oral statement, he asserts, was not needed "to secure the scene." That analysis displays an

---

[2] Petitioner correctly observes (Br. 16) that at the time of the framing, the precise equivalent of modern police forces did not exist. But that observation does not support the conclusion he draws, *i.e.*, that the existence of an evidence-gathering purpose and the risk of governmental shaping of a declarant's words are irrelevant in determining whether a statement is "testimonial." In *Crawford* itself, the Court explained that pre-constitutional magistrates "performed the investigative function now associated primarily with the police," and that police involvement today "in the production of testimonial evidence presents the same risk" as the historic abuses. 541 U.S. at 53.

unrealistic sense of the objective dangers that prompted the officer's actions. An officer who responds to a potential domestic abuse emergency cannot content himself with "securing the scene" while he is there, but must consider the potential for a repeated flare up of violence when he leaves. A reasonable officer would not engage in evidence gathering before ensuring how to protect a potential victim, and if the officer's inquiries did diverge into interrogation, the emergency-questioning rule would be inapplicable to statements so obtained. See U.S. Amicus Br. at 16-17, *Davis* (No. 05-5224). Indeed, courts have recognized that police officers responding to a domestic emergency are primarily involved at first in protecting possible victims from harm, rather than gathering criminal evidence. See, *e.g.*, *United States* v. *Hadley*, 431 F.3d 484, 502 (6th Cir. 2005) (opinion of Rosen, J.) (in responding to a 911 call, officers' dialogue with defendant's wife could "hardly be viewed as * * * 'structured police questioning' directed at the 'production of testimony with an eye toward trial.'" Rather, the officers' concern, at least initially, would have been to ascertain the nature of the assault or domestic disturbance reported by the 911 dispatcher") (quoting *Crawford*, 541 U.S. at 56 n.7).

This recognition appears in other areas of the law as well. The "community caretaking doctrine" under the Fourth Amendment recognizes that "police officers are not invariably engaged in the investigation of criminal activity." *Hadley*, 431 F.3d at 502 (opinion of Rosen, J.). See *United States* v. *Russell*, No. 04-10681, 2006 WL 213853, at *3 (9th Cir. Jan. 30, 2006) (describing Fourth Amendment "emergency doctrine" as permitting warrantless police entries when the police have, *inter alia*, "reasonable grounds to believe that there is an emer-

gency at hand and an immediate need for their assistance for the protection of life or property"); *United States* v. *Brooks*, 367 F.3d 1128, 1135, 1137 (9th Cir. 2004) (entry justified following 911 call reporting possible domestic abuse where officer had "an objectively reasonable belief that a woman might be injured and entry was necessary to prevent physical harm to her"; officer was justified in remaining following her denial of injury to ensure that she was not exposed to "likely future harm at the hands of a hostile aggressor who may remain unrestrained by the law") (internal quotation marks omitted). Cf. *Brigham City* v. *Stuart*, cert. granted, No. 05-502 (Jan. 6, 2006) (presenting questions concerning emergency aid exception to the warrant requirement under *Mincy* v. *Arizona*, 437 U.S. 385 (1978)). A correspondingly practical appraisal of the behavior of a reasonable officer in an emergency should also control here.

B. The Oral Statements Made By Ms. Hammon Were A Response To Emergency Questioning

Under the correct legal standard, described above and more fully in the government's brief in *Davis*, Ms. Hammon's oral statement to Officer Mooney that petitioner assaulted her was the product of emergency questioning and therefore was not testimonial. When Officer Mooney first arrived at the home of petitioner and Ms. Hammon in response to a report of a domestic dispute, he asked Ms. Hammon what had happened, and she said that everything was fine. Because Ms. Hammon appeared frightened, however, a reasonable officer would have concluded that there remained a possibility that Ms. Hammon was in immediate danger and that she had

said that everything was fine because she was in fear of petitioner.

The concern of a reasonable officer for Ms. Hammon's safety would have been heightened once the officer entered the house and saw a fire emanating from a gas heater and shattered glass on the floor nearby. That kind of wreckage would have alerted a reasonable officer to the possibility that there might have been a very recent physical altercation between Ms. Hammon and petitioner, that petitioner might be a volatile person who was still simmering under the surface, and that petitioner might immediately attack Ms. Hammon once Officer Mooney left. Petitioner's admission that there had been an argument, but that it had not been physical, would not have dispelled a reasonable officer's concern.

In order to assess that possibility of imminent harm to Ms. Hammon, it was objectively reasonable for Officer Mooney to ask Ms. Hammon what had happened. Only by learning whether there had been a physical altercation, and if so, the nature of that altercation, could a reasonable officer assess whether it would be safe for him to leave or whether he would instead need to take further steps to protect Ms. Hammon from harm. When Ms. Hammon responded that petitioner had thrown her to the ground, pushed her face into the glass, and punched her, she was responding to questioning that was reasonably necessary to determine whether she was in imminent danger. She was not testifying. The Indiana Supreme Court therefore correctly held that the admission of Ms. Hammon's oral statement did not violate the Confrontation Clause.[3]

---

[3] The Indiana Supreme Court found that Ms. Hammon told Officer Mooney that petitioner had assaulted her after Mooney asked what

As the Indiana Supreme Court concluded, Ms. Hammon's affidavit, by contrast, was testimonial. A government-solicited affidavit, almost by definition, is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (quoting Noah Webster, *An American Dictionary of the English Language* (1828) (definition of "testimony")). Moreover, unlike emergency questioning, government-solicited affidavits have all the characteristics of *ex parte* examinations. In soliciting an affidavit, the government communicates to a declarant that his or her statement is being sought for use in a legal proceeding; the government's involvement in the production of an affidavit creates a unique danger that the government will shape the statement to support its case;

---

happened. J.A. 82. At trial, Officer Mooney did not testify to the specific question he asked; indeed, he did not testify that he asked a question. He did testify, however, that he went into the living room to speak to Ms. Hammon, and that she then told him what had happened. J.A. 17. From that testimony, the Indiana Supreme Court could reasonably infer that Mooney asked Ms. Hammon what had happened. There is no evidence that Mooney engaged in questioning that was objectively structured to produce evidence for a legal proceeding, or that Mooney questioned Ms. Hammon under circumstances that would have imparted to her that her statement was being taken for use in a legal proceeding. See *Crawford*, 541 U.S. at 53 n.4 (finding questioning to be interrogation when knowingly given in response to structured police questioning); See U.S. Amicus Br. at 11, *Davis*, *supra* (No. 05-5224). While petitioner suggests in passing (Br. 34) that Mooney's "what happened" question has the quality of interrogation because he asked the question once before, he does not argue that the case should be decided on that basis. In any event, when officers are faced with circumstances objectively pointing to the existence of an immediate or imminent risk of harm, questioning that is reasonably necessary to determine whether there is an emergency, and if so, how to resolve it, is not interrogation.

and government-solicited affidavits ordinarily produce nothing more than a weak form of live testimony, without any independent probative force. Cf. U.S. Amicus Br. at 11-19, *Davis*, *supra* (No. 05-5224). (discussing the characteristics of *ex parte* examinations and explaining why emergency questioning does not share them).

Although Ms. Hammon's affidavit was testimonial, that does not affect the admissibility of her oral statement that petitioner assaulted her. The oral statement was a response to emergency questioning, and a subsequent affidavit does not retroactively transform the character of an earlier oral statement. Nor is there anything unusual about that sequence of events. Once an officer has obtained the information necessary to determine whether there is an emergency, and if so, how to resolve it, he may naturally and reasonably turn to other matters, including the collection of evidence for use at trial. That phenomenon does not cast doubt on the emergency nature of the original questioning.

No matter how close in time two statements are, each must be evaluated individually to determine whether it was taken by a procedure that resembles the *ex parte* examinations that the Framers sought to abolish as evidence against the accused. Because Ms. Hammon's oral statement that petitioner had assaulted her was the product of emergency questioning, it was not taken through a procedure that resembles *ex parte* examinations. The subsequent use of a procedure that *does* resemble *ex parte* examinations does not alter that conclusion.

CONCLUSION

The judgment of the Indiana Supreme Court should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General

FEBRUARY 2006